

No. 13043

United States
Court of Appeals
for the Ninth Circuit.

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding
Officer, Montana Induction Center, Butte,
Montana,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

JAN - 7 1952

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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United States District Court, District of Montana

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Respondent.

THE PETITION OF CHARLES R. NEIBAUER
FOR A WRIT OF HABEAS CORPUS

To the Honorable United States District Judge
in and for the District of Montana.

The petition of Charles R. Neibauer, residing in the County of Blaine, and State of Montana, respectfully shows as follows:

I. That he is a citizen of the United States and is of the age of twenty-five (25) years.

II. That he duly registered with Local Board No. 3, for Blaine County, at the City of Chinook, State of Montana, pursuant to the provisions of the Selective Service Act of 1948.

III. That, in conformity with the Selective Service Act, your petitioner dutifully filed a questionnaire, and as required, therein set forth his status, and asked to be placed in Class II C.

IV. That Local Board No. 3, for Blaine County, at the City of Chinook, State of Montana, consisting of Edward T. Jenkins, Clarence Simons and

Vern McIntyre, had powers granted to it by the Selective Service Act, the regulations promulgated thereunder, and the proclamation of the President of the United States, to classify registrants for service in the armed forces of the United States, and for limited service, and to grant deferments and exemptions. That said Local Board No. 3, aforesaid, was instructed by the authority of the Congress and the President of the United States as to their duties regarding classifications of registrants, and required to exercise great care in making the classifications required to be made under the prescribed regulations.

V. That your petitioner made application to said Local Board No. 3 and to the members thereof to be classified II C for the reason that he was exclusively engaged in agriculture in the production for market of wheat, sheep and cattle, operating 1800 acres, and that he was principally responsible for the operation of said acreage; that living on said farm with him and dependent upon him were his father, mother and brother, but that the Local Board aforesaid and the State Appeal Board, disregarding his rights and reasons for such classification, classified your petitioner in Class I A, thereby making your petitioner immediately eligible for service in the armed forces of the United States.

VI. That your petitioner thereupon, and within the time provided therefor, appealed said classification to the appropriate Appeal Board and Agency, and that said Appeal Board, acting on said appeal, continued your petitioner in Class I A, without

dissenting vote; that your petitioner, having no further appeal, petitioned the National Director of Selective Service and the State Director of Selective Service as within the regulations provided for a review of the determination of the Local and State Board, and for an appeal to the President of the United States; that said petitions were denied; petitioner further requested the Local Board to reopen and consider anew his classification on the basis of a change in registered status resulting from circumstances over which petitioner had no control, which request was denied by the local board, without hearing; petitioner further petitioned the State Director and National Director of Selective Service to issue a written request to the Local Board to reopen and consider anew petitioner's classification which petitions were denied.

VII. That Local Board No. 3, and the said Appeal Board, and the said State and National Directors of Selective Service, denied your petitioner his lawful rights in placing him in Class I A, which rights were granted to your petitioner under the provisions of the Selective Service Act of 1948, the regulations and the proclamation of the President of the United States, and that your petitioner has exhausted his administrative remedies by appeal and petition as provided in said act, and regulations, and that your petitioner will be forced to remain in wrongful custody or compelled to commit a crime by virtue of the void and invalid classification and order to report for induction.

VIII. That your petitioner submitted full and conclusive proof both to local board No. 3 and to the appropriate Appeal Board that petitioner was exclusively engaged in agriculture in the production for market of wheat, sheep and cattle, which are essential to the National Defense and to the preservation of the National Economy, and that he was principally responsible for the operation of a unit of 1800 acres; that in detail he offered proof that his father is, and was at the time when petitioner's claim for classification was made, physically unable to operate and manage the farm unit; that his said father suffers a serious heart ailment and condition as well as arthritis, and is now hospitalized for said condition by doctors orders at the Deaconess Hospital at Havre, Hill County, Montana, that said condition is growing progressively worse and which condition according to advice of physicians regularly in attendance upon petitioner's father, might and may result in death upon the strain of farm work. That petitioner's mother is unable to support herself and is unable to operate or manage said farm; that petitioner's brother is and will be unable to operate or manage said farm unit by reason of a permanent physical disability. Your petitioner further shows that he was denied a fair and impartial hearing upon such claim for classification, that the Local Board arbitrarily and capriciously refused both petitioner and his father any right to personally appear before the said Board on the matter of his classification, that said Board discriminated against said petitioner because

of his membership and activity in a farm organization, that said Local Board declined to hear pertinent evidence which petitioner offered both in regard to the matter of his classification and in the request to reopen and consider anew his classification, and that said boards acted arbitrarily and in the abuse of their discretion and without any basis in fact in placing and continuing your petitioner in Class I A.

IX. That on or about the 18th day of May, 1951, your petitioner received a notice from Local Board No. 3 of the County of Blaine, City of Chinook, State of Montana, informing him that he had been selected for induction into the Army of the United States, and directing him to report to said Local Board on the 13th day of June, 1951, at 8:15 a.m. for transfer to the United States Army Induction Station at Butte, Montana, for induction.

X. That your petitioner reported to the United States Army induction station at Butte, Montana, on the 14th day of June and that he is, as of the date of the filing of this petition and has, from the time of reporting to said United States Army Induction Station, been wrongfully restrained of his liberty under or by color of the authority of the United States under and by virtue of a void and invalid classification and order of induction, and that at said induction station he was examined as to his physical, social and moral standards and was accepted; that Captain Max R. Harris is now the Commanding Officer of said induction center and

as such wrongfully holds your petitioner in custody awaiting transfer to Fort Lewis to begin his service, and that said custody is, and will be in violation of petitioner's rights under the Constitution of the United States and the Selective Service Act of 1948, and the regulations promulgated thereunder.

Wherefore, your petitioner prays:

(1) That a Writ of Habeas Corpus issue from this honorable court to be directed to Captain Max R. Harris, aforesaid, and whomsoever may hold your petitioner in custody, commanding him or them to have the body of your petitioner before the District Court of the United States for the District of Montana, on the 19th day of June, 1951, at the opening of court on that day, or at such other time as in such Writ shall be specified, for the purpose of inquiring into the cause of the restraint and detention of your petitioner, and to do and abide such order as the court may make in the premises.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

Affidavit of verification attached.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

ORDER

Upon reading the petition of Jerry J. O'Connell, attorney for petitioner, and good cause appearing therefore,

It Is Ordered

That a Writ of Habeas Corpus issue out of this court directing the production of the body of said Charles R. Neibauer before the court on the 19th day of June, 1951, at Helena, Montana.

Dated this 15th day of June, 1951.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

The President of the United States of America to Captain Max R. Harris, Commanding Officer of the United States Army Induction Station, Butte, Montana, and to whomsoever else may have the custody of the body of Charles R. Neibauer, Greetings.

You are hereby commanded, that the body of Charles R. Neibauer, by you restrained of his liberty, as it is said, detained by whatever name the said Charles R. Neibauer may be detained together with the day and cause of his being taken and de-

tained, you have before the Honorable W. D. Murray, District Judge of the United States District Court in and before the District of Montana, at the courtroom of court, in the city of Helena, at 10:00 o'clock in the forenoon of the 19th day of June, 1951, so as to do and receive what shall then and there be adjudged concerning the said Charles R. Neibauer, and have you then and there this writ.

Witness the Honorable W. D. Murray, United States District Judge, at Helena, Montana, this 15th day of June, 1951.

/s/ H. H. WALKER,
Clerk.

Marshal's Return

I hereby certify and return that I received the within Writ of Habeas Corpus at Butte, Montana, on the 15th day of June, 1951, and executed the same by serving the within-named Captain Max R. Harris, Commanding Officer of the U. S. Army Induction Station, at Butte, Montana on the 15th day of June, 1951.

D. A. BATCHOFF,
U. S. Marshal.

By /s/ ETHEL FLEMING,
Deputy.

[Endorsed]: Filed June 20, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed, by and between Counsel for the Petitioner herein, Jerry J. O'Connell, Esq., and Counsel for the Respondent herein, Dalton Pierson, Esq., United States District Attorney, that the hearing ordered by the Honorable W. D. Murray, United States District Judge, in the above-entitled cause, for ten (10:00 a.m.) o'clock a.m. on the 19th day of June, 1951, at Helena, Montana, be and is continued until a day to be set by said court herein.

Done at Butte, Montana, this 18th day of June, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

/s/ DALTON PIERSON,
United States District Attorney, Attorney for
Respondent.

/s/ R. LEWIS BROWN, JR.,
Assistant United States
District Attorney.

[Endorsed]: Filed June 18, 1951.

In the District Court of the United States for the
District of Montana, Helena Division

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte Mon-
tana,

Respondent.

ORDER

The above matter having regularly come on for hearing before this Court on June 19, 1951, at 10:00 a.m., at Helena, Montana, and the respondent, Capt. Max R. Harris, being present in Court and represented by R. Lewis Brown, Jr., Esq., Assistant United States Attorney for the District of Montana, and the petitioner not being present in person nor represented in Court by counsel, and the Court having heard testimony and having considered the evidence and being fully advised in the premises, and it appearing therefrom to the satisfaction of the Court that the petitioner was not, and is not now, a member of the Armed Forces of the United States and was not inducted into the Armed Forces of the United States, and it further appearing that the petitioner herein was not on the date, or dates, set forth in his petition for Writ of Habeas Corpus restrained of his liberty nor held in custody against his will by the respondent, Capt. Max R. Harris, nor by any other representative, or representatives, of the Armed Forces of the United States, or at all

Now Therefore It Is Ordered, and this does order, that the Writ of Habeas Corpus heretofore issued by this Court be dissolved, and the same hereby is dissolved, and that the Petition for Writ of Habeas Corpus heretofore filed with the Clerk of Court upon which hearing was had herein be dismissed, and the same hereby is dismissed.

Dated at Butte, Montana, this 20th day of June, 1951.

/s/ W. D. MURRAY,

United States District Judge.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 21st day of June, 1951.

[Seal]

H. H. WALKER,
Clerk.

By /s/ ELIZABETH E. SPRINGER,
Deputy.

[Endorsed]: Filed and Entered June 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles R. Neibauer, Petitioner, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that final judgment entered in this action on the 19th day of June, 1951, to wit, that order of the Honorable W. D. Murray, United States District Judge for the District of Montana, Helena Division, dissolving the writ of habeas corpus granted by said Court on June 15th, 1951, and dismissing the petition filed therein.

Dated this 22nd day of June, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner and
Appellant.

[Endorsed]: Filed June 22, 1951.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That I, Charles R. Neibauer, as principal, and the Royal Indemnity Company, as surety, are held and firmly bound unto Captain Max R. Harris, Commanding Officer, Montana Induction Center, United States Army and Air Force Station, Butte,

Montana, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Captain Max R. Harris, as Commanding Officer of the Montana Induction Center, United States Army and Air Force, Butte, Montana, his attorney, the United States District Attorney for Montana, and his successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 22nd day of June, 1951.

Whereas, lately at a session of the District Court of the United States for the State of Montana in an action pending in said court designated as Civil No. 521, between Charles R. Neibauer, Petitioner, and Captain Max R. Harris, Commanding Officer, Montana Induction Center, judgment and order was duly made, given and entered on June 19, 1951, by the Court, and Charles R. Neibauer, having filed with the said District Court, in the office of the Clerk of said Court a Notice of Appeal as provided by the Rules of Civil Procedure for the District Courts of the United States,

Now, the condition of the above obligation is such, that if the said Charles R. Neibauer shall prosecute his said appeal to effect, and shall answer all costs that may be awarded against him if he fails to make his plea good, or if the appeal is dismissed or the order or judgment affirmed, or such costs as the Appellate Court may award if the

Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

CHARLES R. NEIBAUER,
Petitioner.

By /s/ JERRY J. O'CONNELL,
His Attorney in Fact and at
Law.

ROYAL INDEMNITY
COMPANY,

By /s/ WM. E. RAE,
Attorney in Fact.

Countersigned:

MORROW AND LOUTTIT
INSURANCE AGENCY,

By /s/ KEITH M. LOUTTIT,
Montana Licensed Agent.

[Endorsed]: Filed June 27, 1951.

[Title of District Court and Cause.]

ORDER GRANTING STAY

By order of the Honorable W. D. Murray, United States District Judge, for the District of Montana, a writ of habeas corpus was granted to the petitioner and directed to respondent herein; said respondent was ordered thereby to produce the body of petitioner whom he was unlawfully restraining

under the color of the authority of the United States of America at a hearing to be held before said Court at Helena, Montana, at 10:00 o'clock a.m. on the 19th day of June, 1951;

Said hearing was held on said day and after hearing testimony of the respondent herein said court by order entered on the same day dissolved the writ of habeas corpus and dismissed the petition of petitioner herein;

On the 22nd day of June, 1951, within the time prescribed by the Federal Rules of Civil Procedure of the Court of Appeals of the Ninth Circuit and the provisions of title 28 United States Codes Annotated petitioner herein gave notice of appeal of said final order and judgment dissolving said writ and dismissing said petition by filing said notice of appeal with the Clerk of said Court.

It appearing that there is good cause therefor and the prevention of injustice to appellant herein by virtue of the provisions of Rule 29, sub-division 2, of the Rules of the Circuit Court of Appeals for the Ninth Circuit which provide that where a writ of habeas corpus has been issued and discharged the court may allow a stay of proceedings upon the furnishing of a supersedeas bond or may grant release to the appellant on his own recognizance; and by virtue of the provisions of rule 45, section 2, of the United States Supreme Court Rules with reference to a stay of proceedings upon appeal from an order discharging a writ of habeas corpus, which rule provides that where a writ of habeas corpus has been issued and discharged, upon

appeal to the Circuit Court of the order discharging said petition the court may grant a stay of proceedings, either upon the furnishing of a supersedeas bond in a sum to be fixed by the court or may release the petitioner on his own recognizance as the court may see fit,

It is hereby ordered that all proceedings for the execution or enforcement of the induction of petitioner herein into the Army of the United States are hereby stayed until the final determination of the appeal taken by the petitioner from said judgment and order of the District Court, and it is further ordered that the aforesaid stay is granted on condition that the petitioner herein in the event said appeal is determined against him or is dismissed he will abide by and promptly carry out and fulfill the directions of the respondent herein and on the further condition that the petitioner promptly prosecute the said appeal.

Dated this 22nd day of June, 1951.

CHARLES N. PRAY,

United States District Judge.

[Endorsed]: Filed June 22, 1951.

Entered June 23, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Hon. H. H. Walker, Clerk of the United States District Court for the District of Montana, Helena Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the Petitioner in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. Petition for Writ of Habeas Corpus, filed by the Petitioner herein on his behalf and at his request and direction, by his Attorney of Record, Jerry J. O'Connell, Esq., on the 15th day of June, 1951.

2. The Order of the Hon. W. D. Murray, United States District Judge, that a Writ of Habeas Corpus issue out of said Court, filed the 15th day of June, 1951.

3. The Writ of Habeas Corpus directed to the Respondent herein issued by the Clerk of said Court on the 15th day of June, 1951.

4. The Stipulation entered into and agreed upon by and between Jerry J. O'Connell, Esq., Attorney of record for the Petitioner herein, and Dalton

Pierson, United States District Attorney for Montana, and his Assistant, R. Lewis Brown, attorneys of record for the Respondent herein, dated the 18th day of June, 1951, and filed in the office of the Clerk of said Court on the same date.

5. The Order of the Hon. W. D. Murray, United States District Judge, entered and filed on the 21st day of June, 1951, in the Clerk of the said Court's office, dissolving the Writ of Habeas Corpus theretofore issued by said Court, and dismissing the Petition for Writ of Habeas Corpus theretofore filed with the Clerk of said Court.

6. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, filed with the Clerk of said Court on the 22nd day of June, 1951.

7. The Bond on Appeal filed with the above Notice of Appeal.

8. The Order of the Hon. Charles N. Pray, United States District Judge, issued on the 22nd day of June, 1951, granting a Stay of Execution to the Petitioner herein.

9. The complete transcript of the hearing held before the Hon. W. D. Murray, United States District Judge, at Helena, Montana, on June 19, 1951, as taken down by the Reporter for said Court, and all exhibits, if any, offered in evidence at said hearing.

10. Petitioner's Statement of Points intended to be relied upon on said appeal.

11. This Designation of Record.

Dated at Great Falls, Montana, on this 19th day of July, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for the
Petitioner herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 21, 1951.

In the United States District Court, District of
Montana, Helena Division

No. 521

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte, Mon-
tana,

Respondent.

TRANSCRIPT OF HEARING ON PETITION
FOR WRIT OF HABEAS CORPUS

Heard by the Honorable W. D. Murray, United
States District Judge for the District of Mon-
tana, at Helena, Montana, June 19, 1951.

Be It Remembered, the above matter came on
for hearing before the Honorable W. D. Murray,

United States District Judge for the District of Montana, sitting without a jury at Helena, Montana, on June 19th, 1951, at 10:00 o'clock a.m. The respondent was present in person and represented by his counsel, R. Lewis Brown, Jr., Esq., Assistant United States Attorney for the District of Montana. Thereupon, the following proceedings were had:

The Court: No. 521, Charles R. Neibauer versus Captain Max R. Harris, hearing on petition for habeas corpus.

Mr. Brown: May it please the Court, counsel for Neibauer doesn't appear to be present. We attempted to contact him yesterday, and we were informed by the girl in his office that he could be contacted either in the Montana Hotel, Kalispell, or the office of—I forget the name of the attorney. Anyhow, we called the Montana Hotel. He didn't have a reservation there and wasn't registered there, and we called the office of the attorney, the number of which his girl had given us. He wasn't there and wasn't expected there.

The Court: What is the situation with reference to the petitioner, is he in the custody of the Army?

Mr. Brown: No, your Honor, he is not, he is home now.

The Court: Is he in the Army?

Mr. Brown: No, he had been found acceptable for service, but had not been inducted.

The Court: What is the situation then?

Mr. Brown: The situation apparently was Mr. O'Connell called up Captain Harris and told him he was going to get a stay of induction. As a result, Captain Harris asked Neibauer to remain in Butte

another 24 hours and see what happened. O'Connell called me up and told me he was going to get a writ of habeas corpus and was coming over with it. I called Captain Harris and told him that. As a result, he didn't induct Neibauer, and a result, he released Neibauer, and Neibauer went home. It is impossible for the Captain to [2*] produce Neibauer in Court today because he never had custody of him.

The Court: Captain Harris is here?

Mr. Brown: Yes.

The Court: Swear Captain Harris.

CAPTAIN MAX R. HARRIS

called as a witness by the Court, being first duly sworn, testified as follows:

The Court: Take the stand, Captain. You are Captain Harris, Max R. Harris?

A. Yes, sir.

The Court: Are you the commanding officer of the Montana Induction Center at Butte?

A. Yes, sir.

The Court: As such you are in charge of the activities of the Army and the induction of draftees under the Selective Service Act, is that so?

A. Yes, sir.

The Court: Are you acquainted with Charles R. Neibauer?

A. Yes, sir.

The Court: Did he appear at the Induction Center in response to an order?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Captain Max R. Harris.)

A. Yes, sir, I believe he was there Thursday.

The Court: What occurred there, what is the situation? [3]

A. The first thing concerning Neibauer's case brought to my attention was the fact he had prepared a statement protesting his induction, based on the fact, according to his statement, that his case hadn't been properly reviewed by the Local Board. Such matters actually are of no concern to us; that would not have stayed his induction, since a man that is forwarded to us by an order by the Local Board, we have no reason to doubt he has been properly treated. It wasn't until just about an hour prior to the actual induction ceremony that I had any further word on it, at which time I was called by Mr. O'Connell, Mr. Neibauer's attorney, indicating he had been in conference with you, that you were on the bench at the time, that he could not get a writ staying his induction, but as soon as you got off the bench, you indicated that you would issue such a writ; in the meantime, you asked he be not inducted. There was no precedent, and I had nothing in regulations to cover what should have been done in such matters. I wasn't sure such a writ was possible, but under the circumstances, I thought it advisable to postpone his induction for 24 hours to see what came of it. I did call my headquarters at Vancouver, Washington, to ask their advice, but at the time I called, there was no officer present who could advise me upon the matter, so I took it upon myself to postpone his induction

(Testimony of Captain Max R. Harris.)

for 24 hours. I asked Mr. Neibauer to remain in Butte overnight. He had every right to refuse, he could have refused without my [4] being able to stop him. I asked if he wouldn't stay over 24 hours until we heard from this writ, which he did. He was in touch with us all the time. I was called by the United States Attorney's office in Butte, about, as I recall, one o'clock daylight time advising me that a writ had been secured and Mr. O'Connell was on his way to Butte with it to deliver it, so I withheld any further action on inducting Mr. Neibauer until the writ could be served, which it was about six o'clock that evening. At that time, of course, Mr. O'Connell got in touch with Mr. Neibauer and took him away.

The Court: Well, let the record show that the Court did not request the Army to withhold inducting the petitioner. As a matter of fact, the Court was advised that the petitioner had already been inducted and was merely awaiting transfer outside of the state to an army camp. It just wasn't the situation I envisioned at all, and the United States Attorney is directed to prepare an order, and I do order, that the writ be dissolved, the writ heretofore issued be dissolved, and the petition be dismissed. You prepare a proper written order, Mr. Brown, and I'll sign it. That just leaves the situation, Captain Harris that you should proceed with the induction of the petitioner.

Captain Harris: I'll have to get him back first.

The Court: Well, get him back, you have authority to do that, haven't you? [5]

(Testimony of Captain Max R. Harris.)

Captain Harris: I'll have to notify the Local Board. I don't have authority without the Local Board.

The Court: You should notify the Local Board. That is all. Thank you very much. I appreciate your idea of trying to cooperate with me. However, as I say, I didn't understand the situation, and I did not request you not to induct him. As a matter of fact, for example, he asked me if I couldn't order the boy to go home. I said, "No, if he has been inducted, he is under army jurisdiction, and I doubt if Captain Harris would have the authority to order him to go home."

Captain Harris: Only the writ of habeas corpus allowed me to let him go as it was.

The Court: Surely. The writ is dissolved and you can proceed with the induction.

(End of hearing.) [6]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the Official Court Reporter of the United States District Court for the District of Montana, Helena Division, that as such I reported the hearing on the Petition of Charles R. Neibauer for a Writ of Habeas Corpus, heard by the Honorable W. D. Murray, United States District Judge for the District of Montana, at Helena, Montana, June 19th, 1951, and that the

foregoing is a full, true and correct transcript of the proceedings had at said hearing.

Dated at Butte, Montana, July 25, 1951.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed July 26, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 521, Charles R. Neibauer, Petitioner, vs. Captain Max R. Harris, Commanding Officer, Montana Induction Center, Butte, Montana, Respondent, and designated by the petitioner as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed July 26, 1951.

Witness my hand and the seal of said Court at Helena, Montana, this 1st day of August, A.D. 1951.

[Seal]: /s/ H. H. WALKER,
Clerk as aforesaid.

[Endorsed]: No. 13043. United States Court of Appeals for the Ninth Circuit. Charles R. Neibauer, Appellant, vs. Captain Max R. Harris, Commanding Officer, Montana Induction Center, Butte, Montana, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed August 3, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13043

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte, Mon-
tana,

Appellee.

STATEMENT OF POINTS

The Appellant in the above-entitled action, through his counsel of record, hereby adopts for his statement of points upon which he intends to rely upon this appeal, the Statement of Points to be relied upon on appeal, heretofore and on the 21st day of July, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon Counsel for the Appellee, and certified by the said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said Statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated this 23rd day of August, 1951.

CHARLES R. NEIBAUER,
Appellant.

By /s/ JERRY J. O'CONNELL,
of Counsel of Record for the
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED
FOR USE UPON APPEAL

To Paul P. O'Brien, Esq., Clerk of the United
States Court of Appeals for the Ninth Circuit:

You are hereby requested to print, and the Appellant in the above-entitled cause hereby designates, that portion of the Record of the District Court of the United States for the District of Montana, in said cause heretofore designated by the Appellant, which Designation of Record was filed with the Clerk of the District Court of the United States for the District of Montana on the 21st day of July, 1951, and served upon Counsel for the Appellee, and certified by the said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, as the portions of the said record which are material to the consideration by

this Court of the appeal herein, and as such shall be printed by the Clerk of this Court.

Dated this 23rd day of August, 1951.

CHARLES R. NEIBAUER,
Appellant.

By /s/ JERRY J. O'CONNELL,
of Counsel of Record for the
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1951.

In the United States District Court, for the District
of Montana, Helena Division

Civil No. 521

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding
Officer, Montana Induction Center, Butte,
Montana,

Respondent.

STATEMENT OF POINTS

The Petitioner in the above-entitled cause sets forth the following points on which he intends to rely on his appeal to the United States Court of Appeals for the Ninth Circuit.

The Trial Court erred as follows:

1. In proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court;

2. In failing or refusing to determine whether Petitioner or his Attorney of record had actual or constructive notice that Stipulation of Counsel was to be disregarded and Hearing proceed as scheduled;

3. In proceeding to hear the above-entitled cause in the absence of Petitioner or his Attorney of record, who relied upon Stipulation theretofore entered between Counsel for both parties, and who had no notice that hearing was to proceed at the time held;

4. In failing, in the furtherance of justice, in a matter involving Petitioner's liberty, to set hearing for another date, where proper hearing with all parties present, could have been had, without prejudice to either party and his rights;

5. In requiring and determining that Petitioner must be a member of the Armed Forces of the United States before Writ of Habeas Corpus will lie;

6. In finding and concluding that Petitioner must be a member of the Armed Forces of the

United States before a Writ of Habeas Corpus will lie;

7. In finding and concluding that Petitioner must be inducted into the Armed Forces of the United States before a Writ of Habeas Corpus will lie;

8. In finding and concluding that the Petitioner herein was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Respondent herein nor by any other representative, or representatives, of the Armed Forces of the United States, or at all;

9. In ordering the dissolution of the Writ of Habeas Corpus, and in dismissing the Petition of the Petitioner for a Writ of Habeas Corpus herein. Dated at Great Falls, Montana, on this 19th day of July, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 21, 1951.

